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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-167

UNITED STATES OF AMERICA,

Petitioner,

v.

CHARLES W. RAMSEY and
JAMES W. KELLY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT CHARLES W. RAMSEY

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QUESTION PRESENTED

Whether customs officials in exclusive custody and control of the international equivalent of domestic first class letter mail matter may invade the privacy thereof, upon suspicion that drugs were "possibly" contained therein, without first securing a search warrant.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

19 U.S.C. 482, 19 U.S.C. 1582, and the pertinent portions of 19 C.F.R. Part 145 and 39 C.F.R. Part 61 (1975) set out in Appendix A, at pages 1A-5A of the brief for Petitioner.

STATEMENT

Charles W. Ramsey and James W. Kelly were long-time friends who, the record reflects, pooled their resources to commence a heroin-by-mail enterprise in the Washington, D.C. area. Essentially, letters containing nearly pure heroin were mailed from Bangkok, Thailand to various locations for distribution.

On January 29, 1974, Bailey and Ward, their suppliers, registered at a hotel in Bangkok and the Thai authorities were alerted to their arrival by German agents. Twenty-four hour surveillance was then placed on them. During that surveillance, Ward was observed to place letter-size envelopes in six different mail boxes. Five of these envelopes were seized from the mailboxes and among the various addresses thereon was one destined for a Ramsey-Kelly local mail drop. On February 2, 1974, police officers entered Bailey and

Ward's hotel room, arrested them, and seized all of the ingredients of their heroin-by-mail operation. Eleven of the sealed heroin filled envelopes seized at that time had Washington, D.C. area addresses which were later tied in to Ramsey and Kelly. On February 4, 1974, the Drug Enforcement Administration in Washington received a cable concerning the recent Thai developments including the arrests of Bailey and Ward. (A. 3, 56)

On that same date and, independent of the knowledge of what had previously transpired, New York based Customs Officer George Kallnischkies routinely seized and opened eight heroin laden envelopes addressed to four D.C. area locations. These envelopes had been mailed by Bailey and Ward in Thailand for eventual delivery to Ramsey and Kelly. The eight envelopes were then placed in a locked container and sent from New York City to Washington, D.C. (A.57)

As a result of this seizure in New York, Drug Agents here alerted a Postal Inspector on February 5, 1974, of the complete description of the eight envelopes seized and those seized in Bangkok, Thailand. On February 7, 1974, the Postal Inspector notified one of the Drug Agents that three similar envelopes had been intercepted and detained at the Main United States Post Office in Washington, D.C. That same day Agents Landrum and Atlee obtained a United States Magistrate's Search Warrant for these three envelopes. The envelopes were seized and subsequently determined to contain nearly pure heroin. (A. 59-60)

On February 12, 1974, the eight letters seized and searched in New York arrived in their locked container and were recovered by Postal Inspector Hall. Then, for the first time, Agents Landrum and Atlee obtained a search warrant for these eight envelopes. On February 14, 1974, six of the eight envelopes were delivered to three addresses contained thereon – two to each location. The two remaining ones were not delivered

because of an error in addressing them by Sylvia Bailey to a non-existent address in Washington. James Kelly was then observed on February 14, 1974, in the company of two women, making his rounds to the three surveilled locations and to recover six envelopes which he placed in a brown paper bag. At approximately 1:15 p.m. Kelly drove to the unit block of S Street, N.E. between North Capitol Street and Lincoln Road, parked his car, and walked to 13 S Street, N.E., where Charles W. Ramsey resided. At about the same time, Ramsey was observed to drive slowly past Kelly's car, circle the block and park about a car length in front of Kelly's car. Kelly walked to the driver's side of Ramsey's car and gave the latter the brown paper bag containing the six letters. Agents moved in quickly and made their arrests. (A. 56-74)

George Kallnischkies testified that he was employed by the United States Custom Service and worked Region 2, New York City. His main responsibility was to examine incoming foreign mail, letter class mail, to see if it contained any dutiable merchandise or contraband. The usual procedure was for the mail in question to come into Kennedy airport and from there be routed to the various post offices; in the instant case the mail was delivered to the General Post Office.

On Monday, February 4, 1974, Mr. Kallnischkies was working and had occasion to "inspect" letter class mail that had entered this country from other countries. Prior to February 4, 1974, the witness remembered that heroin had been seized from mail coming in from Thailand. He observed the eight letters which raised his suspicions and weighed one of the envelopes and found it to weigh 42 grams which he considered rather heavy for an airmail envelope. It also felt as if something was inside of the envelope, not merely plain paper. Accordingly, he opened the envelope via his normal procedure:

> "I usually have a very primitive tool, an ice pick and I just peal (*sic*) the flap open very carefully and remove the contents and examine them . . . ."

Upon opening one of the envelopes herein, he found two pieces of cardboard, and between them, a plastic bag containing heroin. The seven other envelopes appeared similar to him and Mr. Kallnischkies proceeded to open those also and discover heroin in each of them.

The witness stated that no search warrant had been obtained to open the mail in question which he described as airmail letter type envelopes. At the time Mr. Kallnischkies opened the envelopes, he had no prior information about this case nor had he previously noticed the addresses typed on the envelopes for delivery in this country. These particular articles of airmail, had they been mailed within this country would have been considered the equivalent of first class mail.

> "Q Now, on the face of each one of these envelopes, did they appear to be so-called letter mail, as you looked at the envelope?
>
> A Yes, sir, these are letters. . . ."

It is clear that the first intrusion into this mail occurred at 1:30 p.m. on Monday, February 4, 1974, and that the items searched could not have arrived at the post office that same day. These eight letter type envelopes arrived at the post office from the airport at the latest on Sunday and at the earliest on Saturday. They were kept there for inspection over the weekend because the customs people did not work on weekends although the post office personnel did. Because of several prior heroin mailings from Thailand, Mr. Kallnischkies was generally suspicious of all mail coming in from that country which probably ranged between "200 or 500 envelopes from" there. On occasions mail

would be opened which turned out to contain innocuous material. The particular envelope in question raised a suspicion in his mind:

> "Q In other words is it fair to categorize this as intuition or intuitive?
>
> A Yes, sir."
>
> "You know, if you wanted me to be specific, based on my experience, I would say this is Thailand and possibly heroin."
>
> (A. 28-54)

The cases proceeded to non-jury trial upon the basis of a stipulated record below after various motions raised by the defense were denied by the district court. Upon prior agreement of counsel and the court, twelve of the seventeen drug related counts against Mr. Ramsey in Crim. No. 74-623 were severed and he was adjudged guilty on counts one, two, fourteen, fifteen and seventeen. On February 14, 1975, he was sentenced to concurrent terms of imprisonment for these offenses, the longest of which was 10 to 30 years.

In Crim. No. 74-624 he was adjudged guilty of two firearm's offenses and received lesser terms.[1]

A divided panel of the court of appeals reversed. Judges McGowan and Tamm held that before international letter mail may be opened, a showing of probable cause be made to and a warrant secured from a neutral magistrate. The majority, while recognizing that Postal Regulations include within the term *international letter class mail* items that would clearly be packages, was careful to delimit its definition of the term, for warrant purposes, to that mail matter which common sense tells us are letters. (Pet. App. A 9a-10a, n.6) The majority opinion gives full recognition to the border search exception to the warrant procedure when dealing with packages moving through international mail. (Pet. App. A. 5a-6a) Judge Robb dissenting, thought that the border search exception extended to sealed envelopes moving in such mail, as had two other Circuit Courts of Appeal that had considered the question. (Pet. App. A 19a-20a)

[1] These weapons offenses were, concededly, the fruit of the narcotic arrest and these convictions stand or fall with the heroin offenses. Cf. Pet. 5, n.4; Br. 5, n.4

SUMMARY OF ARGUMENT

The Government's brief contains a great deal of misleading extra-record factual material to support an administrative burden theory, which should not be relied on by this Court. This case concerns the opening of envelope mail which looks exactly like the domestic equivalent of first class airmail letters. Respondent concedes that packages may be opened at the border without search warrants. In developing a theory of undue burden in securing warrants for entering mail, the Government has injected facts into its brief which, at first blush, appear to deal with the number of seizures from envelope mail by customs officers for certain time periods, but which actually include seizures from package type mail in that its definition of *envelope* subliminally encompasses mail matter not in excess of four pounds (except that for Canada there is a sixty pound limit) and with a maximum length of 24 inches and a maximum length, breadth and thickness, combined, of 36 inches.

The statutory history of border search authorization indicates that 19 U.S.C. 482 and its predecessors never contemplated that customs officers could seize incoming international letter mail without warrants therefore. Custom and usage supports this statutory construction and the Government concedes, that for the first 195

years of our nations history "letter mail was not opened by customs officials acting alone . . . " (Br. 21) Furthermore, the unwarranted opening of this mail matter will chill important First Amendment rights. Although the Government asserts that customs officers do not open envelopes unless they have reason to believe that they contain things in addition to correspondence, the Petitioner's own figures show that, upon opening the mail, the officers found *neither* dutiable or prohibited items more than 80 per cent of the time. It is reasonable to infer that such innocent mail opened in excess of 8 out of 10 times contained nothing but correspondence. This chilling effect on free speech will be cured by returning the Customs Service to the penumbra of the Fourth Amendment – as judicial superintendence has a way of making officers more responsible to the public they serve. Furthermore, since the major target of these mail openings is drugs and resultant federal prosecutions, at least 1,000 Drug Enforcement Administration agents who work hand in hand with customs officers stand ready, willing and able to secure search warrants for any true letter type mail and thus relieve the Customs Service of any perceived undue burden.

ARGUMENT

THE WARRANT PROCEDURE OF THE FOURTH AMENDMENT MUST BE COMPLIED WITH BEFORE THE INTERNATIONAL EQUIVALENT OF DOMESTIC FIRST CLASS LETTER MAIL MAY BE SEARCHED AFTER SUCH MAIL REACHES OUR SHORES AND REMAINS IN THE EXCLUSIVE CUSTODY OF THE GOVERNMENT.

A. The Government's brief contains misleading extra-record factual material not to be relied on by this Court.

Prior to writing our instant pleading, we moved to strike the Government's brief on the ground that it contained extra-record factual material and that, furthermore, such material was misleading. After an opposition and reply thereto were filed this Court denied the motion by fiat. In resisting our assault upon the brief the Solicitor General suggested a remedy if our allegations were correct:

> "If the statements of fact should not have been included in the brief, the proper remedy would be for the Court to disregard them, not to strike the brief. If the statements were misleading, the proper procedure would be for the respondent to show, in his brief on the merits, why they are misleading and why the Court should not rely upon them."
> (Opp. 1)

In support of this procedure he offered us the assistance of the Customs Service which provided the information to the Department of Justice in the first instance. (Opp. 3) Although we continue to consider such fact-finding at the appellate level inappropriate we

have, nonetheless, accepted the Solicitor's suggestions in light of his experience in dealing with the Court, the probable acquiescence in the suggested procedure by this Court reflected in the unexplained denial of our motion and, most importantly, to correct the record.

This case concerns the opening of envelopes which look exactly like the domestic equivalent of first class airmail letters. Color photographs of them are contained in the record on appeal to visually attest to this assertion. The court of appeals was careful to limit its ruling solely to the perimeters of the mail matter before it and excluded package mail from the warrant requirement.

> "There is, of course, no ready line available to distinguish letters from packages; the distinction is one of degree. We are satisfied that the envelopes in this case . . ., Government Exhs. 35-40, were in size *and appearance* closer to the letter end of the spectrum and fell outside of the border search exception." (Pet. App. 9a, n.6) (Emphasis supplied)

Respondent Ramsey does not contend that mail matter other than the type appearing in this record is subject to the warrant requirement – he specifically rejects the notion that packages cannot be searched at the border without a warrant. Cf. Br. 13-18.

In support of its administrative burden argument (Br. 24-36), the Government has included in its brief the following facts which nowhere appear in the record and which confronted Respondent Ramsey for the first time upon a reading of that brief:

Page 8.

> "More than one billion envelopes arrive each year. . ."

Page 8-9.

> "In fiscal 1976 customs officers opened approximately 270,000 envelopes (less than 0.03% of the total), of which approximately 48,000 contained dutiable or prohibited items, which is more than three envelopes containing dutiable or prohibited items per officer per working day. In order to find these envelopes, each officer opens approximately 19 envelopes per working day, sorting them from the approximately 1,900 whose exteriors he inspects."

Pages 24-25.

> "The Customs Service informs us that during each of fiscal years 1975 and 1976 more than one billion envelopes and 42 million packages entered the United States from abroad.[19] Most of these envelopes and packages are not accompanied by any declaration of their contents. . ."

[19] "'Envelopes,' in the sense used in this brief, refers to all envelope-shaped mail of any postage rate, and not simply mail moving at international letter class rates."

Page 25.

> "The Customs Service has augmented its staff of 62 officers assigned to inspection of envelopes with trained dogs and an x-ray machine."[20]

[20] "Twenty customs facilities use trained dogs."

Page 26-27.

> "The Customs Service informs us that in fiscal 1975 and again in fiscal 1976 the Postal Service referred for screening approximately 27 million envelopes (about one-fortieth of the envelopes entering the United States in each of those years). The Customs Service estimates that in each of those years its inspectors opened for visual inspection approximately 270,000 pieces of mail,

or one of every 100 examined. Many of these openings were supported only by suspicion; the total openings represented approximately one of every 4,000 envelopes arriving from abroad.

Of the approximately 270,000 pieces of mail opened each year, the Customs Service informs us, it found undeclared dutiable materials in approximatley 27,000. Duty was assessed on these items before delivery. The Customs Service also found 18,000 envelopes containing prohibited items in fiscal 1975 and over 21,000 envelopes containing prohibited items in fiscal 1976.[22] The discoveries of prohibited items in envelopes dwarfed the discoveries in packages: only 748 prohibited items were found in packages in fiscal 1975, and only 915 in fiscal 1976."

[22]See Appendix B, *infra*, p. 7A, which sets out a description of the prohibited items found and seized. This table counts only one item per envelope, but some contained more than one. With 62 officers examining 27,000,000 envelopes yearly, and assuming 230 working days each year, each officer must scrutinize almost 1,900 envelopes daily, or 240 each hour. Each officer opens approximately 19 envelopes daily and finds approximately 3.3 containing prohibited or dutiable items." (footnote 21 omitted.)

Pages 30-31.

"The data provided by the Customs Service shows that fewer than one in 4,000 envelopes is opened, however, and there is no evidence in the record of this case demonstrating that the Customs Service violates its regulation forbidding the reading of letters. There is no practice of routinely opening without a warrant envelopes that appear to contain only correspondence".

Page 35.

"Customs officials who must scrutinize an average of 1,900 envelopes daily, and who now open an

average of 19 envelopes daily, could not find time to draw up 19 applications for warrants. . . ."

In addition, Appendix B (Br. 7a) is an extra-record compendium of alleged customs seizures from categories designated as letter mail and parcel mail for 1975 and 1976. Seizures of prohibited items from letter mail for this period total 39,326 items and such seizures from parcel mail total but 1,663 items. Upon the bases of these facts the Government somberly warns:

"If probable cause and a warrant were required for each opening, the inspection process would grind to a halt."

(Br. 9)

Pursuant to the Solicitor's offer, on December 20, 1976, counsel representing Respondent Charles W. Ramsey met with Dennis Cronin, Esq., General Attorney U.S. Customs Service and Mr. Michael D'Angelo, Operations Officer Duty Assessment Division, U.S. Customs Service. We were advised by these gentlemen that the data in the Government's brief are based upon Customs Form 151 which is a report prepared by each customs officer for each mail seizure he makes. The type of mail matter searched is categorized with a "P" for package mail and "L" for letter class mail. There is no requirement that an accurate description be given on the form of the mail matter opened or that pictures thereof be taken. Furthermore, we were also advised that the "L" class mail on the form – which has been translated to "envelope" in the government's extra-record fact formulation – is defined by 39 C.F.R. 22.1(b), (c), which all customs inspectors utilize in filling out the 151. Those regulations define letter class mail to include pieces not in excess of four pounds (except that for Canada there is a sixty pound limit) and with a maximum length of 24 inches and a maximum length,

breadth and thickness, combined, of 36 inches. The "L" or "P" classification does not alter, we were told, by the securing of the mail matter with string nor because of the postage rate at which it moves through the mails. Thus, when the Government's brief alludes to customs officers opening approximately 270,000 "envelopes" in fiscal 1976 the term envelope as used obviously includes a plethora of mail that even grade school children would call packages.[2]

For all we know 20 percent, 50 percent, or perhaps, 80 percent of these "envelopes" could very well have been packages when viewed from a common sense angle of vision and, concededly, not subject to the warrant requirement.

It is for these reasons we have consistently urged that the extra-record material herein is misleading and not the stuff upon which this Court's judgment should rest.

Furthermore, the government apparently believes that it has adequately discharged its burden of apprising us as to the real meaning of "envelope," via footnote 19, *i.e.*,:

> " 'Envelopes' in the sense used in this brief, refers to all envelope-shaped mail of any postage rate, and not simply mail moving at international letter class rates."
>
> (Br.25)

[2]In some of the "L" 151's turned over to us for review we were not suprised therefore to find, *inter alia*:

1. "Suspected hashish inside cassette" (*sic*).
2. "Suspected hashish in plastic bag inside cassette with brown wrapping paper."

No wonder the Government could confidently allege that "the discoveries of prohibited items in envelopes dwarfed the discoveries in packages. . . ." (Br. 27)

In addition, when it is postulated that in "fiscal 1976 customs officers opened approximately 270,000 envelopes . . ., of which approximately 48,000 contained dutiable or prohibited items, ..." (Br. 8), this Court might find it interesting to know how this 270,000 approximation was arrived at. If a search does not yield dutiable or prohibited items a form 151 is not filled out and no record is kept of the intrusion. Mr. D'Angelo explained to us how this figure was reached in the absence of any records as follows. Nine key regional customs people were contacted pursuant to the Justice Department's request for the information who in turn relied on their mail branch people to think back over the year and, based on their experience, to arrive at a figure as to how many "L"s they thought were opened in fiscal 1976 in that region. The nine key regional people in turn each submitted their estimates which totalled up to "approximately 270,000 envelopes." (Br.8)[3]

By some alchemy not yet fully revealed to us, all of these extra-record facts have been dubbed "legislative facts" or "legislative information." (Opp. 2) and therefore, to be properly injected into the Government's brief. However, for the reasons we have advanced we cannot take the Government's "legislative facts" seriously, for we do not know the accurate contours of any oppressive administrative burden that

[3]In light of this explanation to us by Customs, we reject the accuracy of footnote 2 in the Government's Opposition to our Motion to strike its brief:

"The Motion to Strike asserts (p. 3) that the Customs Service data were 'generated . . . specifically to further the quest for reversal in this Court.' This statement is in error, as respondent's counsel was informed before filing his motion; the information contained in Appendix B and elsewhere in our brief is preexisting information compiled for its own purposes by the Customs Service." (Opp. 3, n.2)

might exist and thus, cannot intelligently respond to the Government's self-generated argument on this score.[4]

[4]Interesting to note in this regard is the fact that of some 105 sample Customs Forms 151 turned over to us on a randomly selected basis which reported seizures from "L" designated mail matter from around the country, of the 101 that were readable, *every single one* concerned illicit drugs in small quantities. Although the Government's brief hawks other fears of smuggling; no jewels, precious metals, microfilm or money (Br. 18) were found in any of this "L" type mail. Furthermore, based on our experience, the senders do not appear to be large scale dope dealers, but rather servicemen and students forwarding small samples of drugs back home. Thus, from this sampling provided to us by the Government, the following were found in small quantities:

40 "L"s – Hashish
29 "L"s – Cocaine
26 "L"s – Marijuana
3 "L"s – Liquid Hashish
2 "L"s – Heroin
1 "L" – Cocoa Leaves.

In many of these cases the drugs were turned over for processing to agents of the Drug Enforcement Administration who work closely with Customs as was done herein. Since it appears that the overwhelming majority of such searches involve drugs and criminal law enforcement, there are least one thousand D.E.A. agents around the country who stand ready, willing and able to rapidly obtain search warrants for contraband entering the country in true letter type mail and thus relieve the potentially burdened customs inspectors of this chore. Cf. *United States v. Van Leeuwen*, 397 U.S. 249 (1970), wherein this Court unanimously upheld the authority of officials to detain domestic first class mail for 29 hours while they investigated suspicious circumstances and obtained a search warrant.

In addition, the Government's brief states that undeclared *dutiable* materials were discovered in approximately 27,000 pieces of mail in fiscal 1976 and 21,000 envelopes contained *prohibited* items during this same period. (Br. 26) Appendix B solely seeks to report seizures of *prohibited* items and nowhere in the brief are we specifically told what the dutiable materials consisted of or the precise nature of the mail matter they entered in. Looking at Appendix B in light of our assertions of

(continued)

B. The border search exception to the warrant requirement does not extend to the international equivalent of domestic first class letter mail.

The starting point of any discussion concerning the so-called "reasonableness" of government agents seizing the property of citizens, is the constitutional mandate that search warrants are the preferred route thereto. In

(footnote continued from preceding page)

what "L" type mail really refers to, we see that pornography accounts for some 15,000 pieces of "L" mail seizures while "soft" drugs account for the vast majority of the remaining 6,000 seizures. By pornography we assume the Government is referring to the commercial variety thereof and not servicemen or students sending dirty pictures to their anxious friends back home. For if it is referring to the latter, then widespread intrusions into privacy are committed daily by customs officers. Furthermore, "pornography" includes photos, books and films, and we find it hard to believe that the bulk of the 15,000 pornography seizures were not from "L" mail matter weighing up to four pounds and having a maximum length, breadth and thickness, combined, of 36 inches. 39 C.F.R. 22.1(b), (c). Thus, it is not unreasonable to assert that most of this pornography arrived to our shores in "packages" which could be seized without a warrant anyway. Taking the remaining 6,000 "L"s at face value, an experienced customs officer knows when suspected drugs are his target and this amounts to but 26 warrants per day, assuming 230 working days each year. 26 search warrants per day to be secured by customs agents aided, if deemed desirable, by at least 1,000 D.E.A. agents on a countrywide basis is no real burden at all. Again using the Government's own figures at face value, we are told that customs officers "do not open envelopes unless they have reason to believe that they contain things in addition to correspondence" (Br. 27); this procedure accounted for 48,000 seizures for 270,000 "L" mail openings in fiscal 1976–an error of judgment rate in excess of 80 percent. (Br. 27) We therefore must conclude that nothing but correspondence was found over 80 percent of the time and that a probable cause/search warrant requirement will tighten up this presently unconstitutional procedure that tends to chill First Amendment guarantees.

construing this command of reasonabless, there has been general agreement that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. 523, 528-529 (1967). The presumption has always been that a warrant should be obtained whenever practicable, and exceptions to the warrant requirement have been based on exigent or other circumstances where delay would frustrate legitimate police activity. The warrant requirement "is not an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971).

In light of this well entrenched approach to the limitations on governmental power, we find somewhat anomalous Petitioner's nerve-center theory that a petty official can search at his whim any incoming international letter class mail–"[n]othing else–not suspicion, not probable cause, and not antecedent judicial approval–is constitutionally necessary." (Br. 12, footnote omitted.) The Government seeks to support this heady contention on the basis of alleged long-term statutory authority and, the force of history.

1. Statutory Authority.

We are told that "the officer was acting pursuant to authority granted by a statute enacted in 1866 that explicitly allows customs searches of 'envelopes' (See 19 U.S.C. 482 . . .)." (Br. 10)

19 U.S.C. 482, provides in relevant part:

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine * * * any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; * * *.

A proper understanding of that statute as it presently exists begins with *Carroll v. United States*, 267 U.S. 132 (1925), which sustained the probable cause search of a car without a warrant under the National Prohibition Act because of the exigencies of apprehending a fleeing car. In reflecting upon such searches the Court alluded, *inter alia*, to the progenitor of 19 U.S.C. 482 which:

> "[M]ade lawful for customs officers not only to board and search vessels within their own and adjoining districts, but also to stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandize which was subject to duty or had been introduced into the United States in any manner contrary to law. . . .". *Carrol, supra*, at 151. The Court alluded to this statute and similar ones–
>
> "To show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the

locality or jurisdiction in which the warrant must be sought." *Id.* at 153.

Thus, this Court long ago viewed the border search concept as inseparably entwined with the element of exigence, lest the offending party and his wares disappear into a still rugged country. Where there was no danger of that disappearance, however, a warrant was required even though smuggling was the target. Thus, the foundation Border Search statute considered in *Carroll v. United States, supra,* 3 Stat. 231, 232, March 3, 1815, distinguished between an ambulatory and a permanent situation and mandated a search warrant for the latter.

> "And if any of the said officers of the customs shall suspect that any goods, wares, or merchandise, which are subject to duty, or shall have been introduced contrary to law, are concealed in any particular dwelling, store or other building, he shall, upon proper application, on oath, to any judge or justice of the peace, be entitled to a warrant . . . Provided always, that the necessity of a search warrant, arising under this act, shall in no case be considered as applicable to any carriage, wagon, sleigh, vessel, boat, or other vehicle, of whatever form or construction, employed as a medium of transportation, *or to packages on any animal or animals or carried by man on foot.*" *(Emphasis supplied.)*

We therefore see that search warrants were also required for packages unless there was danger of their disappearing via man or beast. It was this statute which was alluded to in *Carroll* when it was observed that neither this section "nor any of its earlier counterparts has ever been attacked as unconstitutional." 267 U.S. 152. 13 Stat. 441, 442, February 28, 1865, which continued the border search power, only provided for the warrantless stopping and searching of persons or

vehicles in transit. For non-moving situations the statute provided:

> "That in case any store, warehouse, or other building shall be upon or near the boundary line between the United States and any foreign country, and there is reason to believe that [items are placed there in violation of law], and the collector . . . or surveyor of customs, shall make oath before any magistrate . . . , that he has reason to believe, and does believe, that such offence has been therein committed, such officer shall have the right to search such building. . ."

14 Stat. 178, July 18, 1866, for the first time included language specifically authorizing customs officers to search any "trunk or envelope." But it is amply clear from both a reading of the statute and its predecessors, that such searches without warrant only applied to trunks or envelopes on board vessels or upon vehicles, beasts or persons.

> Sec. 2 thereof [authorized customs officers to board any vessel, search the same and] "any person, trunk, or envelope on board. . . ."
>
> Sec. 3 authorized [such officers to also search any] "vehicle, beast, or person on which or whom he or they shall suspect there are goods . . . . "[subject to duty or introduced contrary to law,]" whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have reasonable cause to suspect, there are goods which were imported contrary to law; and if any such officer . . . shall find any goods, wares, or merchandise, on or about any such vehicle, beast, or person, or in any such trunk or envelope, . . ." [he shall seize and secure the same for trial. Every] "such vehicle and beast, or either . . . *and all other appurtenances, including trunks, envelopes,* covers and all means

of concealment . . . ." [shall be subject to seizure and forfeiture.[(Emphasis supplied)

The present statute, 19 U.S.C. 482, is but an abbreviated form of its predecessors which, from this historical perspective, does not authorize the opening of incoming international letter class mail when there is no danger of that mail moving before a warrant can be obtained. Cf. *United States v. VanLeeuwen, supra.*

The Court in *Carroll* also alluded to border searches as follows.

> "Travellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." 267 U.S. 153-154.

In commenting upon such searches, one court of appeals stated:

> "First and most important is the fact that a border search is conducted incident to conferral of the privilege of admittance to the country, and it is certain that the subject of the search is in fact receiving that benefit . . . In effect, a reasonable border search is 'consented' to in order to obtain a benefit that is only to be accorded those who can show that they should gain admittance and who can demonstrate that they are only transporting goods which can lawfully be brought into this country. Moreover, there is little danger of abuse of such searches. *Zweibon v. Mitchell,* 170 U.S. App. D.C. 1, 39, 516 F.2d 594, 632 (1975) (N.93)

Furthermore, said the Court, in these circumstances of searching travellers and their effects at the border *in their presence,*

> "Over-intrusive searches will be apparent to their subjects and may thus be challenged in court. . . .- Finally, . . . there is no substantial likelihood that

> border searches will chill the exercise of First Amendment rights." *Id.*

We thus fail to see how it can be claimed by the Government that 19 U.S.C. 482 somehow authorized the warrantless search in question.[5]

2. History

If we are correct in our historical reading of the border search statutes, we would expect to find that customs officers did not always feel empowered to open international letter mail at their pleasure and accordingly, did not do so. Support for this hypothesis is no further away than the Government's brief. It is conceded therein that for the first 195 years of this nation's history customs officers did not open international letter mail. "Letter mail was not opened by customs officials acting alone until 1971." (Br. 21) This is clear and convincing proof, we submit, that in this limited zone of private correspondence the border search power contended for does not and never has existed in this republic. In 1970, we are advised, the Post Office and Treasury Department jointly proposed changes in the regulations which became effective in 1971, to authorize the type of search conducted herein. (Br. 22-24)[6]

[5] In responding to Senator Ervin's lament that the 1970 proposed regulations authorizing such searches (see *infra,* History) were propounded without public scrutiny, the then General Counsel of the Post Office Department responded, *inter alia:*

> "There are not statutory provisions dealing specifically with the customs treatment of any type of incoming foreign mail." 116 Cong. Rec. 13864 (1970)

[6] At this juncture we cannot help but envision the various bureaucrats from the two agencies mulling over their changing 195 years of history to allow them to invade all international letter mail at their whim and one inquiring of the assemblage:

> "Do you really think we can do this?"

(continued)

Undaunted by this reverse force of history, Petitioner advises us that customs officers really had this power all along but, unlike all other law enforcement officers, never "used the full power conferred by statute." (Br. 18)

The bold but tortured reasoning to support this claim (Br. 21-24) is properly to be compared with a later assertion by Petitioner in response to our motion to strike its brief wherein it was candidly stated that these "historical practices followed by the Post Office and the Customs Service . . . undermines, to some extent, our argument that the opening of envelopes at the border is justified by force of history." (Opp. 6, n.5)

Ex parte Jackson, supra, concerned domestic mail and the opinion indicates that at one time the post office only carried letters, newspapers, magazines and other printed matter not exceeding eight ounces. "Afterwards books were added and now small packages . . . are transported in the mail." The only items which could be searched without a warrant were those open to inspection and thus, "purposely left in a condition to be examined."

As we see it, the right of border search appears to have always extended to persons, vessels, vehicles, beasts, etc., and their wares entering this country based on the dual concepts of national self-protection and the exigencies of the moment. And, as *Zweibon v. Mitchell, supra,* points out, a consent to search by the entering person for himself and/or his wares inheres in the very act of crossing an international border. From time immemorial such unobtrusive searches have always been anticipated as a consequence of international

(footnote continued from preceding page)

The answer is clear.

> "No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution." *Ex parte Jackson,* 96 U.S. 727 (1877).

travel. Not one person reading this brief who has ever travelled to a foreign land has ever done so without expecting and consenting to an invasion of his privacy by customs inspectors. And, as the mail service grew along with the size of what could be mailed, packages were understood to be and were left in a condition to be examined when they reached our shores–an implied consent to have them searched by the sender. (Br. 21) We find no historical support for the sweeping assertion that sealed international letter mail could constitutionally be opened at the discretion of customs inspectors without warrants. Indeed, for a newly founded nation which had engaged in armed rebellion in part because of writs of assistance and general warrants executed by the King's messengers and which generated the Fourth Amendment in response thereto, we find it hard to believe that such a nation would have tolerated for one minute the unfettered opening of its incoming mail by petty officials. At that point in history most Americans were born in England or had relatives and friends there whom they regularly communicated with by mail–a two way inherently personal and private means of discourse. We can only imagine Mr. Jefferson's response to the notion that his return letters could be arbitarily opened before delivery to him, their being "not suspicion, not probable cause, and not antecedent judicial approval" to do so. (Br. 12) That could not have happened however, because at the time, the government layed no claim to such power nor would it have then dared to.

Accordingly, we believe that the full force and effect of *Ex parte Jackson, supra,* applies to the mail matter in the instant case.

> "The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be

opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household."[7]

3. The Present

Because searches aimed at the type of mail matter before us were not undertaken prior to 1971, legal challenges thereto have only recently surfaced in the various courts of appeal. While most of these cases sustain the power asserted, *cf.* Br. 10, n.6, none of them—save the one at bar—even begins to carefully analyze the numerous considerations that impinge on the opening of international letter mail. The most recent case, *United States v. Emery*, 541 F.2d 887 (1st Cir. 1976), sustained the border search of a package but pointedly reserved decision as to "first class letters." Other Judges have expressed a similar hesitancy where letters are concerned. *E.g.*, *United States v. Sohnen*, 298 F. Supp. 51 (E.D.N.Y. 1969) ("The Constitution . . . may well prevent the opening of letters, as opposed to packages . . . without a search warrant.");

[7] *Cotzhausen v. Nazro*, 107 U.S. 215 (1882), cited by the Government does not aid its cause. In that case a dutiable shawl was mailed into this country from Germany and was identified as such in writing on the container it came in. This Court variously described that container as a "sealed envelope" and a "letter". Apparently, the nature of the container was not critical because the trial court, in propounding a special verdict to the jury, called it a "package" three times and a "sealed envelope" once. Furthermore, whatever it appeared to be, the customs people—although notified in writing upon the item itself that it contained dutiable material—did not venture to search it themselves. Instead, a customs officer was notified to be present when the shawl was delivered to the addressee and, only after the addressee opened the mail and removed the shawl did the officer seize it. Accordingly, the case does not even remotely resemble the one before us and cannot be thought to condone the power contended for here.

United States v. Swede, 326 F. Supp. 533 (S.D.N.Y. 1971) ("We do not determine whether the Constitution prevents the opening of letters . . . without a search warrant"); *United States v. Various Articles of Obscene Mer.*, 363 F. Supp. 165 (S.D.N.Y. 1973) ("The constraints . . . [of] the Fourth Amendment do apply to Customs searches . . . Some courts have hinted that the standards may be different when dealing with a letter-sized envelope than when it is a package . . . at issue."). Since none of the courts of appeal have critically assayed the statutory or historical factors vis-a-vis the warrantless search of international letter mail—nor even mentioned that the practice only began full blown in 1971—their opinions have little precedential value.

No less than our forefathers, each of us deplores the thought that our private correspondence is subject to unrestrained governmental intrusion. We are not so much concerned in this shrinking world that our letters will be answered from New York, Boston, London or Munich as with the idea that the flow of that communication process will be unimpeded—we expect and demand that our correspondence will remain private. Such expectation is not unreasonable in light of the fact that our wishes were ininterruptedly respected in this regard for 195 years. Such long standing privacy can easily repel the recent assault thereon by the combined forces of the "Post Office and Treasury Department." (Br. 22-24) *Katz v. United States*, 389 U.S. 347 (1967).

In this regard, the court below was properly concerned with the chilling effect the claimed power might have in the hands of customs officers on First Amendment rights.

> "Even if the ordinary practice of the Customs Service is not to read the mail that is opened, ...mere knowledge on the part of

individuals of the practice of routinely opening mail inhibits the exercise of free speech."

* * * *

It thus appears that there is not a sufficient need, and there is too great a risk to personal privacy, to extend the border search exception to permit unrestrained opening of international mail." (Pet. 11a, 13a).

The Government's own extra-record facts bear out the clear and present danger that exists in this area.

At Br. 27 it is asserted: "customs officers do not open envelopes unless they have reason to believe that they contain things in addition to correspondence."

We are elsewhere told that in fiscal 1976, customs officers found 48,000 dutiable or prohibited items in approximately 270,000 pieces of mail. (Br. 8, 26) We have earlier shown how this 270,000 figure was arrived at post facto without records and, accordingly, the figure could easily be 300,000 pieces of opened mail or more. Using this latter figure, customs officers failed to find either dutiable or prohibited items 84 percent of the time they opened "L" type of mail without a warrant. It is also reasonable to infer that, most of the time such innocent mail was opened, it contained nothing but correspondence. This certainly underscores the court of appeals' concern with the danger to First Amendment rights this practice generates. The court below was right on target when it held that a warrant was required for such searches because, *inter alia*,

"by requiring that the inferences to which law enforcement officials are entitled be drawn by neutral magistrates rather than by officers in the heat of duty, . . ., it helps to limit unjustified intrusions upon the private and communicative material contained in letter mail." (Pet. App. 14a-15a).

We are certain that returning the Customs Service to the penumbra of the Fourth Amendment after its six year frolic free of its strictures, will increase the efficiency of its operatives from a dismal 84 percent error rate to one in the 10 to 15 percent range. Judicial superintendence has a way of making officers more responsible in their conduct as indeed it should–this being the very goal of the Fourth Amendment.

To ward off this compelling claim the Government offers, in part, the following palliatives:

1. "[A]ny person who desires to guard against the reading of international correspondence has a simple expedient: he can send [smaller] envelopes . . . [because they do not] give rise to suspicion that they contain something other than correspondence. There has been no showing in this case that customs inspectors open such envelopes." (Br. 30)

* * * *

2. "In fact, the international exchange of ideas does not stand on an equal footing with the domestic exchange of ideas." (Br. 30, n. 24)

A further consideration is the fact that the real apparent aim of present day border searches of mail is criminal prosecution of drug offenses. It is no mere coincidence that 100 percent of the Customs Forms 151 turned over to us on a random basis involved small drug seizures from "L" type mail. And, working hand in hand with these customs officers are D.E.A. agents who handle the evidence and perfect the prosecutions as, for example, in this case. The true targets of the majority of these searches are the U.S. addressees at home whose mail D.E.A. agents could never hope to open on their own. We accordingly find that the Government has observed in this connection:

> "Moreover, in cases such as the instant one, providing for the presence of the addressee when opening the envelope would drastically subvert the prospects for successful prosecution when a crime is involved to which the addressee is a party." (Br. 31, n.25)

Since there is this close working relationship between the Customs Service and the Drug Enforcement Administration, it would only be proper to have D.E.A. agents secure search warrants to aid the prosecution of these domestic crimes.[8] Indeed, in the case at bar, DEA agents, in fact, obtained search warrants for the eight envelopes originally seized at the N.Y. Post Office without warrant and secured a second search warrant for three more suspicious envelopes at the main Post Office in Washington, D.C., which were tied into this case and had not been previously opened. (App. 59) The court below—as we do—thought that this latter seizure seriously compromised the Government's claim of undue burden in securing such warrants. (Pet. App. 17a)

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[8] The Drug Enforcement Administration informs us that there are presently some 1700 "working agents" in the United States. A working agent is a man on the street making arrests, securing search warrants and the like.